

Court-Imposed Modifications: Supplementing the All-or-Nothing Approach to Discharge Cases

I. INTRODUCTION

Traditionally, courts faced with a discharge claim¹—impossibility of performance,² commercial impracticability,³ or frustration of purpose⁴—have had two alternatives: enforce the contract through an order of specific performance or discharge the burdened party.⁵ The reasoning behind this all-or-nothing approach is that “[s]ince there is no fault on either side, the loss . . . must lie where it falls.”⁶

Recently, however, a United States District Court faced with a claim of commercial impracticability rejected the all-or-nothing approach.⁷ Instead, the court modified the contract and ordered the parties to perform.⁸ This Comment will analyze the desirability of supplementing the all-or-nothing approach with court-imposed modifications. First, the problems with the traditional approach will be described.⁹ Second, the recent decision that recognized the efficacy of court-imposed modifications will be scrutinized.¹⁰ Third, the arguments against court-imposed modifications will be examined.¹¹ Last, the advantages of court-imposed modifications and their place in modern contractual theory will be discussed.¹²

1. The term “discharge” is used throughout this Comment as a generic reference to the doctrines of impossibility of performance, commercial impracticability, and frustration of purpose.

2. The most popular definition of impossibility of performance is found in the RESTATEMENT (FIRST) OF CONTRACTS § 454 (1932): “[I]mpossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.” See generally 6 A. CORBIN, CORBIN ON CONTRACTS §§ 1320-52 (1962); 18 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1931-79 (3d ed. 1978).

3. Judge Skelly Wright, in *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966), interpreted commercial impracticability under U.C.C. § 2-615 (1978) as requiring the following three elements: “First, a contingency—something unexpected—must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable.” *Id.* at 315 (footnote omitted).

4. Frustration of purpose is defined in RESTATEMENT (SECOND) OF CONTRACTS § 265 (1979) [hereinafter cited as RESTATEMENT]:

Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances indicate the contrary.

See generally 6 A. CORBIN, CORBIN ON CONTRACTS §§ 1353-61 (1962).

5. For contrasting views on the evolution of the discharge doctrine, compare G. GILMORE, *THE DEATH OF CONTRACT* 44-48 (1974) with Farnsworth, *Disputes over Omissions in Contracts*, 68 COLUM. L. REV. 860, 862-68 (1968).

6. RESTATEMENT (FIRST) OF CONTRACTS § 468 comment d (1932).

7. *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980).

8. *Id.* at 78-80.

9. See *infra* part II.

10. See *infra* part III.

11. See *infra* part IV.

12. See *infra* part V.

II. THE PROBLEMS WITH THE ALL-OR-NOTHING APPROACH

The problems with relying exclusively on the all-or-nothing approach can be seen in three recent discharge cases.¹³ These cases reveal four basic problems with the traditional approach: first, it forces courts to stretch existing doctrines to reach a desired result; second, it leads to undeserved gains and losses¹⁴ accruing to one party; third, it discourages good faith modifications; and fourth, it creates a situation in which "the buyer [always] wins."¹⁵

A. Doctrine Stretching

To harmonize the all-or-nothing approach with contractual theory, courts have developed an array of doctrines, from implied conditions¹⁶ and assumption of the risk¹⁷ to the more recent theory of the most efficient loss spreader.¹⁸ Ostensibly, these doctrines assist courts in defining "a shifting line of compromise between the impulse to uphold the sanctity of business agreements and the desire to avoid imposing obligations that are in vain or unduly burdensome."¹⁹ However, the recent case of *Iowa Electric Light and Power Co. v. Atlas Corp.*²⁰ illustrates that it is often difficult to fit a case within any of these doctrines.

Electric Light arose out of a 1973 agreement in which Atlas agreed to supply Electric Light with uranium ore for a four-year period.²¹ Within this four-year period, however, the price of uranium increased by sevenfold.²² Consequently, Atlas brought suit for discharge under the theory of commercial impracticability.²³

Initially, the court denied Atlas' claim on the theory of assumption of the risk.²⁴

13. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 517 F. Supp. 440 (E.D. Va. 1981); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied*, 444 U.S. 865 (1979).

14. See *infra* notes 42-43 and accompanying text.

15. This conclusion was reached by Professor Speidel in his article, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management*, 32 S.C.L. REV. 241, 271 (1980) [hereinafter cited as Speidel, *Excusable Nonperformance*]. For an argument that the buyer should win, see Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under U.C.C. Section 2-615*, 54 N.C.L. REV. 545 (1976).

16. For the history and general use of implied conditions, see Speziale, *The Turn of the Twentieth Century as the Dawn of Contract "Interpretation": Reflections in Theories of Impossibility*, 17 DUQ. L. REV. 555, 583-86 (1978-1979); *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903 (1942). For a critical assessment of implied conditions, see RESTATEMENT, *supra* note 4, ch. 11 introductory note; Farnsworth, *Disputes over Omissions in Contracts*, 68 COLUM. L. REV. 860, 862-68 (1968); Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419, 422-25 (1969).

17. The use of the assumption of risk doctrine in discharge cases is detailed in Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 833-39 (1961).

18. The most-efficient-loss-spreader theory is articulated in Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977). The theory is explored further in Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEGAL STUD. 311 (1982).

19. Fuller & Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 379 (1937).

20. 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979).

21. *Id.* at 131.

22. *Id.* For an overview of current uranium market litigation, see Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119 (1977) (concludes Westinghouse should lose in uranium litigation).

23. *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 131 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979).

24. *Id.* at 135.

Next, the court buttressed its first opinion in a second opinion²⁵ which held that a fifty-eight percent increase in contract price was insufficient to render the contract impracticable,²⁶ that Atlas was the most efficient loss spreader,²⁷ and that Atlas should have foreseen the impact of the Middle East War on uranium prices.²⁸

The most defensible rationale used by the court is that Atlas' fifty-eight percent loss was insufficient to render the contract impracticable. Because the courts have had difficulty determining what economic burden will suffice to render a contract impracticable,²⁹ a court can usually find authority to support its decision on this point. Some commentators, however, have criticized the courts' emphasis on economic burden.³⁰ They believe that the proper focus is the extent to which the performance has been changed.³¹ Thus, the impracticability requirement is still an elusive concept.

The *Electric Light* court in its initial opinion held that Atlas failed to establish the first prong of the impracticability test—that the price increase be a contingency the nonoccurrence of which is a basic assumption of the contract.³² The court interpreted this prong in accordance with prevailing authority as requiring that the event be unforeseeable.³³ Recently, a number of commentators have attacked the practice of equating the basic assumption test with a foreseeability test. They contend that this interpretation is an unwarranted expansion of the common law into the commercial impracticability test.³⁴

25. *Id.* at 137 (opinion II).

26. *Id.* at 140-41 (opinion II).

27. *Id.* at 140 (opinion II).

28. *Id.*

29. The courts have reached various results in interpreting the impracticability requirement. *See, e.g.,* American Trading & Prod. Corp. v. Shell Int'l Marine, Ltd., 453 F.2d 939, 942 (2d Cir. 1972) (less than a 1/3 increase insufficient); Louisiana Power & Light Co. v. Allegheny Ludlum Indus., Inc., 517 F. Supp. 1319, 1324 (E.D. La. 1981) (38% increase insufficient); Publicker Indus., Inc. v. Union Carbide Corp., 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975) (not less than a 100% increase will suffice); *see also* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 133 (2d ed. 1980) (indicates a tenfold increase needed). *See generally* Annot., 93 A.L.R.3d 584, 604-09 (1979).

30. *See* Speidel, *Excusable Nonperformance*, *supra* note 15, at 265-71; Note, *U.C.C. § 2-615: Excusing the Impracticable*, 60 B.U.L. REV. 575 (1980).

31. *See* Speidel, *Excusable Nonperformance*, *supra* note 15, at 265-71 (courts should concentrate on the degree to which the performance is changed); Note, *U.C.C. § 2-615: Excusing the Impracticable*, 60 B.U.L. REV. 575 (1980) (courts over-emphasize the economic loss and should instead concentrate on the degree to which the performance has been changed).

32. 467 F. Supp. 129, 134 (N.D. Iowa 1978) (opinion I), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979).

33. *Id.*; *see, e.g.,* Eastern Airlines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 129-30 (2d ed. 1980); Speidel, *Excusable Nonperformance*, *supra* note 15, at 261-62, 262 n. 66; Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 Nw. U.L. REV. 1032, 1042-50 (1978). The classic statement of the foreseeability test was elucidated by California Justice Traynor in *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P.2d 47 (1944):

The purpose of a contract is to place the risks of performance upon the promisor, and the relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably foreseeable. If it was foreseeable there should have been provision for it in the contract, and the absence of such provision gives rise to the inference that the risk was assumed.

Id. at 54, 153 P.2d at 50.

34. *See* Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under U.C.C. Section 2-615*, 54 N.C.L. REV. 545, 567-70 (1967) (argues against interpreting a foreseeability test into commercial impracticability); Speidel, *Excusable Nonperformance*, *supra* note 15, at 261-65 (the foreseeability test strongly militates against a successful assertion of commercial impracticability by a seller); Note *The Doctrine of*

Although the court in *Electric Light* found that the Middle East War was sufficiently foreseeable to justify imposing the risk of its occurrence upon Atlas, the court was unable to reconcile the facts with this result. Illustrative is the court's statement, "There is no doubt that Atlas suffered burdensome increases in production costs. There is no doubt that many of those costs were not foreseen or considered likely to occur or to be so substantial."³⁵ The court also remarked that "[i]t would be unfair to expect Atlas to have prophesied the magnitude of the increases complained of."³⁶ This contradiction illustrates that the commercial impracticability test is often difficult to apply to the facts of a case.

The final rationale forwarded by the court was that Atlas was the most efficient loss spreader. The most-efficient-loss-spreader theory is premised upon the application of economic principles to the law.³⁷ The basic principle behind the theory is that a court should attempt to render the most economically efficient decision. This goal is accomplished by placing the economic burden upon the party that can best spread the loss over the general public.³⁸

In applying the most-efficient-loss-spreader theory to commercial impracticability cases, the result is usually that the seller is the best loss spreader.³⁹ The rationale for this result is either that the seller is in the best position to obtain insurance⁴⁰ or that the seller can best spread the loss among its customers.⁴¹ The most-efficient-loss-spreader theory can be used, therefore, to support most decisions that result in a decision for the buyer.

The problems indicated by the preceding discussion have resulted in courts expanding and constricting doctrines to meet the exigencies of individual cases.

B. The Accrual of "Undeserved" Gains and Losses

Professor Schwartz was the first to use the term "undeserved" to describe gains and losses in a discharge setting.⁴² According to Professor Schwartz, losses are "undeserved" when an unbargained for risk is imposed on a party by enforcement of the contract.⁴³ Because the all-or-nothing approach only affords a court two

Impossibility of Performance and the Foreseeability Test, 6 LOY. U. CHI. L.J. 575 (1975) (contends that a number of factors could have caused the failure to provide for a contingency); Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 NW. U.L. REV. 1032 (1978) (argues U.C.C. § 2-615 does not have a foreseeability test). Professor Farnsworth advocated discarding the foreseeability test from the common law. Farnsworth, *Disputes over Omissions in Contracts*, 68 COLUM. L. REV. 860, 884-87 (1968).

35. 467 F. Supp. 129, 132 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979).

36. *Id.* at 135.

37. See *supra* note 18.

38. Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 *passim* (1977). But cf. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982) (attacks Posner's economic analysis in the context of breach of contract).

39. This conclusion was reached by Professor Speidel in his article, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management*, *supra* note 15, at 271. See also Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under U.C.C. Section 2-615*, 54 N.C.L. REV. 545 (1976).

40. Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 92 (1977).

41. Speidel, *Excusable Nonperformance*, *supra* note 15, at 253.

42. Schwartz, *Sales Law and Inflation*, 50 S. CAL. L. REV. 1, 8 (1976).

43. *Id.*

options—enforcement or discharge—one party will often have to internalize the loss caused by a supervening event.

The decision of a Missouri appeals court in *Missouri Public Service Co. v. Peabody Coal Co.*⁴⁴ exemplifies the imposition of undeserved losses. In 1967, Peabody entered into a ten-year contract to supply Public Service with coal. The contract provided for an index to adjust for inflation over the ten-year period based upon the Industrial Commodities Index. The index, however, subsequently failed to adequately adjust for inflation because of a change in economic conditions precipitated by the Arab Oil Embargo. The failure of the index left Peabody with an estimated 3.4 million dollar loss on the contract.⁴⁵ Confronted with this loss, Peabody sought discharge from the contract under a theory of commercial impracticability.

Following the usual interpretation of commercial impracticability, the court interpreted the requirement of the nonoccurrence of a basic assumption as a foreseeability test.⁴⁶ The court then found that Peabody failed to meet this requirement because Peabody should have foreseen the Arab Oil Embargo and its effect on coal prices.⁴⁷ In supporting this finding, the court stressed that Peabody had wide experience and knowledge in the coal industry,⁴⁸ that Peabody had vast resources,⁴⁹ and that the possibility of an oil embargo was “common knowledge.”⁵⁰

Assuming, contrary to the court's analysis, that Peabody did not foresee the intervention of the Arab Oil Embargo, the court imposed a 3.4 million dollar undeserved loss on Peabody. A defensible argument can be made, and has been accepted by some courts,⁵¹ that in 1967 the Arab Oil Embargo was unforeseeable. For example, in *Freidco of Wilmington, Delaware, Ltd. v. Farmers Bank*,⁵² the court was able to forward a wealth of evidence to support its conclusion that in 1965 the economic upheavals of the 1970s were unforeseeable. The court initially relied upon expert testimony.⁵³ This testimony was buttressed by the 1965 National Power Survey, the most comprehensive survey up to that time, which predicted that electricity prices would decline twenty-seven percent by 1980.⁵⁴ Furthermore, a number of commentators have questioned the accuracy of court decisions finding events foreseeable.⁵⁵ As stated by one commentator, “hindsight is twenty-twenty.”⁵⁶ Ac-

44. 583 S.W.2d 721 (Mo. Ct. App.), cert. denied, 444 U.S. 865 (1979).

45. *Id.* at 722–23.

46. See *supra* note 33 and accompanying text.

47. 583 S.W.2d 721, 728 (Mo. Ct. App.), cert. denied, 444 U.S. 865 (1979).

48. *Id.* at 726.

49. *Id.*

50. *Id.* at 728.

51. See, e.g., *Freidco of Wilmington, Delaware, Ltd. v. Farmers Bank*, 529 F. Supp. 822 (D. Del. 1981).

52. *Id.*

53. *Id.* at 828.

54. *Id.* at 827.

55. See Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 835 (1961); Note, *The Doctrine of Impossibility of Performance and the Foreseeability Test*, 6 LOY. U. CHI. L.J. 575, 578–83 (1975); Note, *U.C.C. § 2-615: Sharp Inflationary Increases in Cost as Excuse from Performance of Contract*, 50 NOTRE DAME LAW. 297, 304–06 (1974); Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 NW. U.L. REV. 1032, 1042 (1978).

56. Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 NW. U.L. REV. 1032, 1042 (1978).

cepting both the commentator's arguments and the findings of the court in *Freidco*, it is evident that an undeserved loss was imposed on Peabody.

Iowa Electric provides another example of the imposition of undeserved losses. The *Iowa Electric* court, like the court in *Missouri Public Service*, found that Atlas foresaw the occurrence of the supervening event.⁵⁷ The *Iowa Electric* court also found, however, that "many of [the] costs were not foreseen."⁵⁸ Further, the court acknowledged that it would be "unfair to [have expected] Atlas to have prophesied the magnitude of the increases."⁵⁹ Thus, at least part of the loss imposed upon Atlas was undeserved.

These cases aptly illustrate that even though the parties may not have intended to allocate a risk to one party, adherence to the all-or-nothing approach requires the imposition. By presenting only two options, the traditional approach forces the court to impose the unbargained for risk on one party.

C. Discouraging Good Faith Modifications

A third criticism of the all-or-nothing approach is that it discourages good faith modifications. The decision in *Missouri Public Service* illustrates this problem.

Because Public Service was receiving coal at just one-third of the market price, Peabody sought a modification of the contract.⁶⁰ In response to Peabody's overtures, Public Service offered a one dollar per ton price increase. After Peabody rejected this offer, Public Service refused to negotiate further.⁶¹ Confronted with Public Service's obstinance, Peabody brought a claim of bad faith. The court summarily dismissed Peabody's claim, stating that "[w]here an enforceable, untainted contract exists, refusing modification . . . does not constitute bad faith"⁶²

By making this statement the court apparently held that unless one party can establish that a contract is tainted (for example, by duress, incapacity, or unconscionability), the other party is never obligated to enter into a modification. This holding would permit a party advantaged by a supervening event to refuse all modification proposals. Considering the current emphasis on good faith modifications,⁶³ this rule appears overly broad. For example, it is arguable that a failure to accept a reasonable modification when neither party foresaw the intervention of an event could constitute bad faith. This argument is supported by the high standards of good faith and fair dealing imposed by the Uniform Commercial Code⁶⁴ and the Restate-

57. See *supra* note 28 and accompanying text.

58. 467 F. Supp. 129, 132 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979).

59. *Id.* at 135.

60. 583 S.W.2d 721, 722-23 (Mo. Ct. App.), *cert. denied*, 444 U.S. 865 (1979).

61. *Id.* at 723.

62. *Id.* at 725.

63. See RESTATEMENT, *supra* note 4, § 89; U.C.C. § 2-209 (1978).

64. U.C.C. § 2-103(1)(b) (1978) defines good faith as "honesty in fact" and as requiring "observance of reasonable commercial standards of fair dealing."

ment (Second) of Contracts.⁶⁵ Complementing these high standards are the provisions permitting easy modification.⁶⁶

To be consistent with these provisions, discharge doctrines should be applied to facilitate modifications. Under the all-or-nothing approach, if an advantaged party, who is not obligated to enter into a modification, refuses to modify the contract, the burdened party has limited alternatives—threaten to cease performing, cease performing, or seek discharge—all of which will usually lead to litigation. Therefore, the joint effect of not imposing a duty of modification upon an advantaged party and of adhering to the all-or-nothing approach may be to increase the likelihood of litigation.

D. *The Buyer Always Wins*

A final problem inherent in the application of the all-or-nothing approach is that it creates a situation in which the buyer usually wins. First, the buyer will usually win if an economic analysis is applied to the case, because sellers are often in the best position to insure against possible supervening events.⁶⁷ In addition, sellers often can spread the losses among many customers, and a seller's losses may be absorbed by other diversified interests.⁶⁸ After an extended analysis of Judge Posner's most-efficient-loss-spreader theory, Professor Speidel concludes that the theory heavily militates against a successful assertion of commercial impracticability by a seller.⁶⁹

Professor Speidel also contends that the present interpretation of commercial impracticability strongly militates in favor of the buyer. He argues that interpreting a foreseeability test into commercial impracticability favors the buyer since experienced sellers usually know that a wide array of supervening events might occur.⁷⁰ This, Speidel reasons, causes courts to find that the seller foresaw the event notwithstanding that the seller could not have predicted the probability of the event occurring or that the parties may not have intended to impose the risk upon the seller.⁷¹ Furthermore, Speidel argues that equating economic burden with the impracticability requirement also favors the buyer because courts hesitate to discharge a seller for fear of undermining the stability of contracts.⁷² The conclusion that the

65. RESTATEMENT, *supra* note 4, § 205 equates good faith with adherence to "community standards of decency, fairness or reasonableness." *Id.* § 205 comment a. Further, it "emphasizes faithfulness to an agreed common purpose and consistency with justified expectations of the other party." *Id.*

66. RESTATEMENT, *supra* note 4, § 89 eliminates the requirement of consideration if the modification is fair and equitable. Similarly, U.C.C. § 2-209 (1978) eliminates the requirement of consideration if the modification is for a legitimate commercial reason.

67. See Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 90-91 (1977).

68. See *id.* at 94-95; Speidel, *Excusable Nonperformance*, *supra* note 15, at 253.

69. Speidel, *Excusable Nonperformance*, *supra* note 15, at 248-71.

70. *Id.* at 260-65.

71. *Id.* at 265-71.

72. An excellent example of this is the courts' uniform denial of impracticability claims during the cotton shortage of the early 1970s. See, e.g., *Bradford v. Plains Cotton Coop. Ass'n*, 539 F.2d 1249, 1251-52 (10th Cir. 1976) (citing cases); *R.N. Kelly Cotton Merchant, Inc. v. York*, 494 F.2d 41 (5th Cir. 1974); *R.L. Kimsey Cotton Co., Inc. v. Ferguson*, 233 Ga. 962, 214 S.E.2d 360 (1975); *Austin v. Montgomery*, 336 So. 2d 745 (Miss. 1976).

buyer is likely to win in discharge cases is further illustrated by the decisions in *Electric Light*⁷³ and *Public Service*.⁷⁴

E. *The Loss Will Not Go Away*⁷⁵

The problem of the loss not going away was deliberately excluded from the initial list of problems⁷⁶ because regardless of how a court applies the all-or-nothing approach, the loss due to the supervening event will have to be internalized by one party. Illustrative of this point is the United States District Court opinion in *Florida Power & Light Co. v. Westinghouse Electric Corp.*⁷⁷

Florida Power arose out of a 1966 agreement in which Westinghouse promised to both provide fuel for and to remove spent fuel from two nuclear power plants.⁷⁸ At the time of contracting, Westinghouse believed that the spent nuclear fuel could be profitably reprocessed.⁷⁹ This early optimism, however, proved unfounded when Westinghouse was unable to secure a reprocessing contract. As a result, Florida Power was left with ever increasing amounts of nuclear waste⁸⁰ the disposal cost of which would be between twenty and forty-four million dollars.⁸¹

The court held that Westinghouse assumed the risk of being unable to find a reprocessor. To a large extent, the court's holding was based upon its factual finding that Westinghouse's officers knew, when the contract was signed, that the future of nuclear reprocessing was uncertain. This finding permitted the court to reason that Westinghouse's failure to provide for this uncertainty in the contract was an assumption of its risk. This reasoning, although often employed,⁸² breaks down when one considers that a variety of circumstances could have caused Westinghouse's omission.

The fallacy that the parties could have provided for every foreseeable contingency has been exposed by a number of commentators. Professors Goetz and Scott have argued that "[s]uch definitive obligations may be impractical because of inability to . . . characterize complex adaptations adequately even when the contingencies themselves [have been] identified in advance."⁸³ Professor Macaulay was one of the first to point out that "[t]oo often . . . businessmen really have not reached agreement on the difficult issues, but have ignored them to avoid argument."⁸⁴ Moreover, Professor Macneil has continually asserted that "planning is inherently filled with

73. See *supra* text accompanying notes 21-41.

74. See *supra* text accompanying notes 44-56.

75. This phrase, although not an exact quotation, comes from F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* 743 (2d ed. 1970).

76. See *supra* text accompanying notes 14-15.

77. 517 F. Supp. 440 (E.D. Va. 1981).

78. *Id.* at 444.

79. Westinghouse's optimism was based to a large extent upon the active encouragement and support of the government in the reprocessing field. *Id.* at 448.

80. *Id.* at 447-48.

81. *Id.* at 460.

82. See Annot., 93 A.L.R.3d 584, 597 (1979).

83. Goetz & Scott, *Principles of Relationship Contracts*, 67 VA. L. REV. 1089, 1091 (1981).

84. Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, PRAC. LAW., Nov. 1963, at 13, 16.

gaps.”⁸⁵ Thus, the reason for Westinghouse’s failure to provide for the uncertainty of nuclear processing is far from clear.

Although finding for Florida Power, the court refused to order specific performance. Instead, it admitted that it “fervently hope[d] that it would not be called upon to draft a [specific performance] decree.”⁸⁶ The court then informed the parties that it intended to “meet and confer with counsel, in an effort to assist them in reaching agreement.”⁸⁷ Plainly, the court was appalled at the prospect of imposing a twenty to forty-four million dollar loss on Westinghouse, and hence spent the rest of the opinion ordering the parties to settle.⁸⁸

The *Florida Power* court was confronted with a situation that ordinarily accompanies the application of the all-or-nothing approach to discharge cases: a tremendous loss must be imposed upon one party since the loss will not simply go away. In applying the all-or-nothing approach this outcome is inevitable. In *Florida Power* the court recognized this dilemma, and therefore attempted to ameliorate the loss through a settlement. What the court actually needed, however, was an alternative to the traditional approach that would permit the equitable distribution of the loss between the parties.

III. RECOGNIZING THE EFFICACY OF COURT-IMPOSED MODIFICATIONS

A. Aluminum Co. of America v. Essex Group, Inc.⁸⁹

The traditional approach was rejected by the United States District Court for the Western District of Pennsylvania in *Aluminum Co. of America v. Essex Group, Inc.*⁹⁰ Judge Teitelbaum, to avoid the problems associated with the traditional approach, abandoned the all-or-nothing approach and modified the contract to effectuate the parties’ original intentions.

The case originated with a twenty-year toll conversion contract negotiated between the Aluminum Company of America (ALCOA) and Essex in 1967. The contract provided that Essex would deliver alumina⁹¹ to ALCOA’s refinery for conversion into molten aluminum. In order to adjust for changes in ALCOA’s nonlabor costs, the agreement contained an index based upon the Wholesale Price Index—Industrial Commodities.⁹² The index had been developed with the help of the noted economist Alan Greenspan.⁹³ Further, Essex had completed its own study of the

85. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U.L. REV. 854, 873 (1978).

86. 517 F. Supp. 440, 461 (E.D. Va. 1981).

87. *Id.* at 462.

88. The court concluded its opinion by stating, “In view of the fact that the interests of both parties and the public would best be served by an expeditious and final resolution of this matter, both parties are urged . . . to reach agreement, rather than in preparing to further litigate . . .” *Id.* at 462.

89. 499 F. Supp. 53 (W.D. Pa. 1980). The case was appealed to the Third Circuit Court of Appeals, but was settled.

90. *Id.*

91. Alumina is an oxide used primarily as a source for metal aluminum. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 64 (1961).

92. 499 F. Supp. 53, 57–58 (W.D. Pa. 1980).

93. *Id.* at 58.

index and concluded that the index correlated closely with ALCOA's nonlabor costs.⁹⁴ At first, the index performed as expected, but subsequent economic upheavals resulted in ALCOA's nonlabor costs increasing by five hundred percent while the index increased only one hundred percent.⁹⁵ This discrepancy left ALCOA with an estimated sixty million dollar loss on the contract.⁹⁶

Following the all-or-nothing approach, Judge Teitelbaum would have had to either discharge ALCOA or impose specific performance. However, because of the actions taken by Essex in reliance on the contract,⁹⁷ discharging ALCOA would have imposed severe economic burdens on Essex.

Initially, to perform its part of the agreement, Essex entered into a separate long-term agreement to obtain a supply of alumina.⁹⁸ Next, to facilitate the contract, Essex built a molten aluminum processing plant adjacent to ALCOA's refinery.⁹⁹ Finally, the supplies of molten aluminum Essex was receiving from the agreement permitted Essex to enter the aluminum public utility cable business, the aluminum extrusion business, and the aluminum magnet wire business.¹⁰⁰ Clearly, Essex had a significant incentive to ensure that the contract would remain in force.

Similarly, ALCOA had a vested interest in the continuing vitality of the contract. ALCOA justifiably expected to receive four cents of profit per pound of aluminum refined.¹⁰¹ Although this finding was disputed by Essex,¹⁰² the four cents per pound expectation was confirmed by two of Essex' internal documents that had been prepared before the contract was signed.¹⁰³ Therefore, whenever ALCOA's profits fell below four cents per pound, the contract price was falling below ALCOA's expectation interest.¹⁰⁴

The subsequent malfunction of the index put Judge Teitelbaum in an untenable position. If he imposed specific performance on ALCOA, ALCOA would have to internalize a tremendous undeserved loss. Initially, sixty million dollars of losses may not appear significant. This figure, however, represents only the losses that would be incurred because the cost of refining exceeded the contract price. The figure fails to take into account the additional four cents per pound expectancy loss. Considering that approximately seventy-five million pounds of aluminum would be re-

94. *Id.* Before entering into the agreement with ALCOA, Essex had spent two years negotiating similar contracts with two other companies. Appellee's Brief to the United States Court of Appeals for the Third Circuit at 4, *ALCOA*. Since Essex spent three years negotiating with three different companies, it strains common sense to believe that Essex did not fully understand the implications of the contract with ALCOA.

95. 499 F. Supp. 53, 59 table I (W.D. Pa. 1980).

96. *See id.*

97. The term "reliance" is being used in this Comment to mean the change in a party's position due to its actions taken in reliance on the promise. *See* Fuller & Perdue, *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 54 (1936); *see also* RESTATEMENT, *supra* note 4, § 344(b).

98. 499 F. Supp. 53, 82 (W.D. Pa. 1980).

99. Brief of Defendant Essex Group, Inc. at 30, *ALCOA*.

100. *Id.*

101. *See* 499 F. Supp. 53, 58 (W.D. Pa. 1980).

102. *See* Brief of Defendant Essex Group, Inc. at 3-16, *ALCOA*.

103. Appellee's Brief to the United States Court of Appeals for the Third Circuit at 27, *ALCOA*.

104. The term "expectation interest" is being used in this Comment as meaning "the value of the expectancy which the promise created." Fuller & Perdue, *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 54 (1936); *see also* RESTATEMENT, *supra* note 4, § 344(a).

financed each year,¹⁰⁵ ALCOA's losses would have been markedly increased. Also, because ALCOA was locked into the contract price of 36.35 cents per pound of aluminum, ALCOA was unable to take advantage of the 73.13 cents per pound market price.¹⁰⁶ Moreover, Essex was taking advantage of this situation by selling twenty-five percent of the refined aluminum on the open market. The 36.35 cents per pound contract price was permitting Essex to underbid ALCOA and take ALCOA's customers.¹⁰⁷ Thus, an order of specific performance would have imposed substantial undeserved losses on ALCOA (ALCOA neither foresaw nor assumed the risk of the malfunctioning of the index); Essex' position if ALCOA were discharged, however, would have been equally burdensome.

Initially, the processing plant built by Essex next to ALCOA's refining plant would have been closed.¹⁰⁸ Moreover, Essex would still have been liable under the separate long-term agreement for alumina.¹⁰⁹ Considering that Essex needed approximately seventy-five million pounds of alumina refined per year, it is unlikely that a suitable replacement refiner could have been found. Even assuming *arguendo* that a suitable refiner could have been found, the price would have been nearly double the contract price.¹¹⁰ Furthermore, during the period that Essex was unable to find a suitable refiner, Essex would have had to withdraw from the aluminum public utility and the aluminum extrusion businesses.¹¹¹ Finally, in considering these consequences, one must remember that all of these losses would have been undeserved since Essex neither foresaw nor assumed the risk of the index malfunctioning.

Faced with these two alternatives under the all-or-nothing approach, Judge Teitelbaum abandoned the traditional approach and chose a third alternative. After finding that the losses were sufficient to render the contract impracticable,¹¹² he cited the Restatement (Second) of Contracts section 272(2) for the proposition that a court, instead of following the all-or-nothing approach, could modify the contract.¹¹³ Judge Teitelbaum then modified the contract by increasing the price to Essex, but also by reducing ALCOA's profit to one cent per pound.¹¹⁴ Thus, in formulating the modification, Judge Teitelbaum attempted to effectuate the parties' original intentions.¹¹⁵

B. *Advantages of Court-Imposed Modifications over the All-or-Nothing Approach in the Context of ALCOA*

As noted earlier, the all-or-nothing approach has four basic problems.¹¹⁶ These

105. See 499 F. Supp. 53, 59 table I (W.D. Pa. 1980).

106. See *id.*

107. Appellee's Brief to the United States Court of Appeals for the Third Circuit at 4, *ALCOA*.

108. Brief of Defendant Essex Group, Inc. at 30, *ALCOA*.

109. See *supra* note 98 and accompanying text.

110. See *supra* note 106 and accompanying text.

111. Brief of Defendant Essex Group, Inc. at 30, *ALCOA*.

112. 499 F. Supp. 53, 73-76 (W.D. Pa. 1980).

113. *Id.* at 79 n.21 (citing RESTATEMENT (SECOND) OF CONTRACTS § 296(2) (unofficial version), which became § 272(2) of the final version).

114. *Id.* at 80.

115. To establish their original intentions, both ALCOA and Essex called numerous witnesses, compiling hundreds of pages of testimony. Appellee's Brief to the United States Court of Appeals for the Third Circuit at 8-40, *ALCOA*.

116. See *supra* notes 14-15 and accompanying text.

problems, although not completely eliminated, are ameliorated by the use of court-imposed modifications. The *ALCOA* case is an excellent example of this point.

The most obvious change that occurred as a result of the modification in *ALCOA* was the division of the losses caused by the malfunction of the index. By imposing a modification, Judge Teitelbaum was able to equalize the burden. While Essex was forced to pay a higher price for the molten aluminum, *ALCOA* correspondingly lost three of its four cents per pound expectation interest.¹¹⁷ Hence, instead of imposing the entire burden upon one party—as is required by the all-or-nothing approach—the loss was equitably split between the parties.

This equitable division of loss contrasts with the problem created by the traditional approach, which results in the loss not going away.¹¹⁸ In *ALCOA* Judge Teitelbaum recognized this problem and alleviated it by formulating an appropriate modification. Even though both parties had to internalize part of the loss, by splitting the loss with a modification, the contract continued to be viable; *ALCOA* continued receiving a profit and Essex continued receiving molten aluminum.

Implicit in the foregoing discussion is the conclusion that when a court imposes a modification, neither party wins or loses. Although technically *ALCOA* won its claim of commercial impracticability,¹¹⁹ it failed to reap the windfall it would have under the traditional approach.¹²⁰ Instead, *ALCOA* was forced to give up significant profits in order to compensate for Essex' price increase. Thus, whether the buyer or the seller wins is of little significance if a modification is imposed.

Furthermore, court-imposed modifications may increase the impetus for parties to reach an out-of-court settlement. For example, it is arguable that if both Essex and *ALCOA* had known that litigation of the commercial impracticability issue might have resulted in a modification, they never would have litigated the issue. Accepting the premise that *ALCOA* would have brought the suit only if it were the most prudent course of action—if the benefits to be gained by the litigation outweighed the costs—then *ALCOA* would not have brought suit if the result of the litigation was equivalent to what it could have achieved in an out-of-court settlement. Supporting this conclusion is the avoidance of significant legal fees that would have resulted from an out-of-court settlement.

Finally, court-imposed modifications may help to stabilize the current law of discharge because courts will not fear that permitting discharge will merely let the party out of a bad contract or will undermine the confidence of people in their contracts. Since in court-imposed modifications the loss is apportioned, even assuming that one party has merely made a bad contract, that party will not be released but will be forced to internalize some of the loss. Further, because the modification should seek to effectuate the parties' original intentions, the parties' positions in

117. See *supra* note 114 and accompanying text.

118. See *supra* notes 75–88 and accompanying text.

119. See *supra* note 112 and accompanying text.

120. If *ALCOA* had been discharged, it could have almost doubled its prices. See *supra* note 106 and accompanying text. In addition, *ALCOA* would have been in an excellent position to extract a very favorable contract from Essex because of Essex' reliance. See *supra* notes 98–100 and accompanying text.

relation to each other after the modification should approximate their positions at the time of contracting.

C. Long-Term Contracts

To fully understand the discharge cases that have been discussed, the unique characteristics of the agreements utilized by the parties—long-term contracts—must be analyzed. This analysis is especially important because court-imposed modifications will probably be used only in cases involving long-term contracts.

First, because of their extended duration, long-term contracts pose problems of risk management. For example, it is apparent that a twenty-year contract cannot provide for every possible contingency.¹²¹ This inability forces the parties to provide for flexible processes to help fill any gaps that arise.¹²² These flexible processes, however, sometimes fail to perform adequately, as evidenced by the indexes used in *Public Service*¹²³ and *ALCOA*,¹²⁴ and thus may ultimately result in litigation instead of dispute resolution.

Second, long-term contracts produce very complex and specialized reliance.¹²⁵ The reliance by a party upon the long-term agreement will often manifest itself in a way that increases the incentive for continued performance.¹²⁶ The increased incentive to perform is aptly illustrated by Essex' building a processing plant adjacent to ALCOA's refinery.¹²⁷ Another example is Florida Power's constructing two nuclear plants based, in part, upon Westinghouse's promise to remove the spent nuclear fuel.¹²⁸

Last, long-term contracts may directly affect the public interest. The public interest may be implicated because discharging a party will result in direct imposition of price increases upon the general public.¹²⁹ Alternatively, the public may benefit if litigation is avoided and an out-of-court settlement privately apportioning the loss is reached.¹³⁰ Moreover, because the contractual relationship may enable the contracting parties to compete in other fields, the termination of the contract may adversely affect the public interest by decreasing competition.¹³¹ Thus, characteristics of long-term contracts often may exacerbate the problems associated with a discharge case.

121. Professor Macneil describes this as one of the two inherent characteristics of long-term relationships. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U.L. Rev. 854, 865 (1978).

122. Professor Macneil describes this as the second inherent characteristic of long-term relationships. *Id.* at 865.

123. See *supra* note 45 and accompanying text.

124. See *supra* notes 92-96 and accompanying text.

125. See Speidel, *Excusable Nonperformance*, *supra* note 15, at 273-74.

126. *Id.* at 274.

127. See *supra* note 99 and accompanying text.

128. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 517 F. Supp. 440, 444-46 (E.D. Va. 1981).

129. See, e.g., *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied*, 444 U.S. 865 (1979). The court, in supporting its order of specific performance, pointed out that Public Service was a public utility and hence that any price increase to it would be imposed upon the general public. *Id.* at 725.

130. See, e.g., *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 517 F. Supp. 440 (E.D. Va. 1981). The court, in supporting its attempt to force the parties to settle, stated that a settlement would be in the public's best interest, *id.* at 462, and would best accommodate "the best interests of both Florida's ratepayers and Westinghouse's shareholders," *id.* at 461.

131. See, e.g., *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980). The discharging of ALCOA would have forced Essex out of several aluminum businesses. See *supra* note 111 and accompanying text.

IV. THE CASE AGAINST COURT-IMPOSED MODIFICATIONS

Even though court-imposed modifications may have advantages over the traditional approach, a number of arguments can be raised against imposing a modification. Four basic arguments have been forwarded: first, court-imposed modifications are contrary to the maxim that a court will not make contracts for the parties; second, court-imposed modifications will undermine the stability of contracts; third, no precedent for court-imposed modifications exists; and fourth, court-imposed modifications will create judicial manageability problems.

A. *The Courts Will Not Make Contracts for the Parties*

It has often been repeated that "[t]he courts will not consider the hardship or the expense or the loss to the one party or the meagerness or the uselessness of the result to the other. They will neither make nor modify contracts nor dispense with their performance."¹³² In the face of this maxim, court-imposed modifications appear to be a revolutionary innovation. However, while courts have often repeated this maxim, they have also developed doctrines to circumvent it.¹³³

In 1897, Oliver Wendell Holmes, the father of classical contract theory,¹³⁴ admitted that courts circumvented this maxim by implying conditions into contracts. Justice Holmes believed that a court might imply a condition for a variety of reasons:

You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.¹³⁵

From this statement, it appears that even though Justice Holmes might have balked at openly modifying a contract, he instead would, and once did, simply imply a condition into the contract to reach the desired outcome.¹³⁶ Subsequently, however, courts went beyond implied conditions and developed a more potent doctrine to circumvent the maxim—the doctrine of the intentions of the parties.

As early as 1941, the Second Circuit Court of Appeals conceded that "[i]ntentions of the parties' is a good formula to square doctrine with result."¹³⁷ The use of the "intentions of the parties" doctrine to modify contracts became so pervasive¹³⁸ that Samuel Williston, Justice Holmes' protege,¹³⁹ argued that the courts should stop

132. *Cameron-Hawn Realty Co. v. City of Albany*, 207 N.Y. 377, 381–82, 101 N.E. 162, 163 (1913).

133. Kessler and Gilmore note that one may consider the courts as having made contracts for the parties and equalized losses for over 100 years. F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* 744 (2d ed. 1970).

134. The classical, objective theory of contracts and Justice Holmes' part in its development are detailed in G. GILMORE, *THE DEATH OF CONTRACT* 5–55 (1974).

135. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

136. In *Hawkins v. Graham*, 149 Mass. 284, 21 N.E. 312 (1889), Justice Holmes, speaking for the Supreme Judicial Court of Massachusetts, implied a condition of reasonableness into a satisfaction clause to prevent an arbitrary withholding of consent. *Id.* at 287–88, 21 N.E. at 313.

137. *Parev Prod. Co. v. I. Rokeach & Sons, Inc.*, 124 F.2d 147, 149 (2d Cir. 1941).

138. See *id.* at 149 (citing cases).

139. For a discussion of Williston's part in attempting to codify the classical contract theory, see *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 760–65 (2d Cir. 1946) (Frank, J., concurring). G. GILMORE, *THE DEATH OF CONTRACT* 35–54 (1974).

cloaking their actions under this doctrine. Williston believed that the courts should admit their reasons for qualifying promises:

Any qualification of the promise is based on the unfairness or unreasonableness of giving it the absolute force which its words clearly state. In other words, because the court thinks it fair to qualify the promise, it does so and quite rightly; but clearness of thought would be increased if it were plainly recognized that the qualification of the promise . . . is not based on any expression of intention by the parties.¹⁴⁰

Hence, both Justice Holmes and Samuel Williston knew and approved of courts' covertly modifying contracts to reach equitable results.

Today, the Uniform Commercial Code and the Restatement (Second) of Contracts provide a court with gap-fillers that can be imposed when the parties fail to provide for certain events. In accordance with these authorities, a court can imply that an offer is open to acceptance for a reasonable time,¹⁴¹ that an offer can be accepted by any reasonable medium in any reasonable manner,¹⁴² that a contract is to last for a reasonable time,¹⁴³ and that a contract is to be for a reasonable price.¹⁴⁴ These examples illustrate that today a court can often imply reasonable terms into a contract when the parties have failed to provide a term. Thus, contrary to the maxim that a court should not make contracts for the parties, a court may make a substantial portion of a contract.¹⁴⁵

B. *The Sanctity of Contracts*

Although the maxim that a court should not make contracts for the parties has lost much of its force, the underlying policy which it supports, that people should be able to rely upon their contracts, is still of vital concern to the courts.¹⁴⁶ At first it appears that court-imposed modifications would undermine the stability of contracts by permitting courts to rewrite agreements. Upon further examination, however, it becomes apparent that court-imposed modifications, if properly imposed, can help to stabilize contractual relationships. The stabilizing effect that court-imposed modifications can have upon contractual relationships will be the greatest in long-term contracts.

Because long-term contracts extend over a long period of time and often involve a series of performances, they contain gaps.¹⁴⁷ The existence of gaps in an agreement manifestly creates uncertainty in the contractual relationship. The uncertainty related to the use of long-term contracts is magnified when one of the parties begins to structure its business around the contract.¹⁴⁸ It follows then that the possibility of an

140. 18 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1937, at 33 (3d ed. 1978) (footnote omitted).

141. See RESTATEMENT, *supra* note 4, § 41(1); U.C.C. § 2-309(1) (1978).

142. See RESTATEMENT, *supra* note 4, § 65; U.C.C. § 2-206(1)(a) (1978).

143. See RESTATEMENT, *supra* note 4, § 204 comment d; U.C.C. § 2-309 (1978).

144. See RESTATEMENT, *supra* note 4, § 204 comment d; U.C.C. § 2-305 (1978).

145. For example, in a sale of goods governed by the Uniform Commercial Code, the only term that must be in writing and signed is the quantity term. U.C.C. § 2-201 comment 1 (1978). All the other terms are supplied by the Code's gap fillers, U.C.C. §§ 2-305, 2-307 to -311 (1978). See also U.C.C. § 2-207 (1978).

146. See U.C.C. § 2-601 comment 1 (1978).

147. See *supra* notes 121-24 and accompanying text.

148. See, e.g., *supra* notes 98-100 and accompanying text.

unforeseen event causing the contract to be terminated deters businesspeople from entering into long-term contracts. This reasoning, however, changes significantly in the context of court-imposed modifications.

Businesspeople are likely to feel confident about entering into and relying upon a long-term contractual relationship if they do not have to worry about the intervention of supervening events resulting in the termination of the agreement. A businessperson's confidence in the long-term agreement will also be augmented by the knowledge that the modification will be directed towards effectuating the original contractual intentions. Moreover, because both contracting parties will be aware that litigation in a discharge situation may result in a court-imposed modification and because neither party would want to incur the costs associated with extended litigation unless a significant economic advantage could be gained, the availability of court-imposed modifications provides increased impetus to reach an out-of-court modification.

The all-or-nothing approach, on the other hand, may actually increase the likelihood of litigation. A buyer receiving a windfall due to the intervention of a supervening event is likely to seek an order of specific performance, for the discharge doctrines favor the buyer.¹⁴⁹ Also, because an advantaged party is not obligated to modify the contract,¹⁵⁰ the disadvantaged party may have no alternative but to litigate. Thus, in comparison to the all-or-nothing approach, court-imposed modifications may reinforce the stability of contractual relationships by increasing businesspeople's confidence in long-term contracts and by increasing the incentive to reach an out-of-court modification.

C. Lack of Precedent

Although the *ALCOA* decision is the only explicit American case law authority for court-imposed modifications, another district court in *Freidco of Wilmington, Delaware, Ltd. v. Farmers Bank*,¹⁵¹ in dicta, approved of *ALCOA* and court-imposed modifications.¹⁵² Moreover, authority supporting court-imposed modifications can

149. See *supra* subpart II(D).

150. See *supra* note 62 and accompanying text.

151. 529 F. Supp. 822 (D. Del. 1981).

152. *Freidco* involved a suit of commercial impracticability brought by *Freidco* to terminate a 30-year lease agreement signed in 1965. *Id.* at 824. The parties had initially agreed to a proportional distribution of the utility costs with *Farmers Bank's* share subject to a \$1.10 per square foot ceiling. *Id.* Although original estimates predicted that the utility price would be between 49–52 cents per square foot, *id.* at 828, subsequent utility price increases caused the utility price to rise to \$1.43 per square foot, *id.* at 824. The court refused to find that this increase was sufficient to render the contract impracticable. *Id.* at 829–30. Nevertheless, the court noted that at the current rate of increase the contract would become impracticable before its termination. *Id.* at 830 & n. 8. At this juncture, the court in a footnote cited approvingly to both *ALCOA* and the Restatement (Second) of Contracts § 272 and stated that if “commercial impracticability [had] been shown, the ‘reformation’ remedy [Freidco] seeks would be a relief alternative open to the Court.” *Id.* at 830 n.9. Thus, at least one other court appears willing in the proper circumstances to supplement the all-or-nothing approach with court-imposed modifications.

be found in the commentaries on discharge cases,¹⁵³ the Uniform Commercial Code,¹⁵⁴ the Restatement (Second) of Contracts,¹⁵⁵ and foreign jurisdictions.¹⁵⁶

The commentators have long argued for an alternative to the all-or-nothing approach. In 1960, a student commentator proposed a statutory loss-splitting scheme.¹⁵⁷ Addison Mueller stated in 1967 that a split-the-loss policy in discharge cases would be "eminently sensible."¹⁵⁸ Kessler and Gilmore in their casebook support a loss-sharing approach to discharge cases by analogizing to maritime law.¹⁵⁹ Professor Macneil contends that in discharge cases the aim of courts should not be to "[pick] up the pieces of broken contracts," but to continue the contractual relationships.¹⁶⁰ Other commentators have also advocated the imposition of modifications in discharge cases.¹⁶¹

Authority for court-imposed modifications also may be found in the Uniform Commercial Code section 2-615, comment 6. This comment provides that

[i]n situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of "excuse" or "no excuse," adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all the provisions in the light of their purposes, and the general policy of this Act to use equitable principles in the furtherance of commercial standards and good faith.¹⁶²

The comment seemingly foresees a common sense, pragmatic approach to discharge cases. This proposition is evidenced by the reference to the provisions on good faith, which connotes that particular attention should be given to "preserv[ing] the flexible character of commercial contracts."¹⁶³ Furthermore, the general policy of Article Two is arguably twofold: increasing the security associated with commercial contracts¹⁶⁴ and keeping contracting parties together.¹⁶⁵ Court-imposed modifications are consistent with comment 6 to section 2-615 because they effectuate both of these goals.¹⁶⁶

153. See *infra* notes 157-61 and accompanying text.

154. See *infra* notes 162-66 and accompanying text.

155. See *infra* notes 167-70 and accompanying text.

156. See *infra* notes 171-75 and accompanying text.

157. Note, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution*, 69 YALE L.J. 1054 (1960).

158. Mueller, *Contract Remedies: Business Fact and Legal Fantasy*, 1967 WIS. L. REV. 833, 837.

159. F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* 743-44 (2d ed. 1970).

160. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854, 875, 873-76 (1978).

161. See Schmitt & Wollschlager, *Section 2-615 "Commercial Impracticability": Making the Impracticable Practicable*, 81 COM. L.J. 9, 14 (1976) (contends modifications are necessary to protect small businesses and insure a stable economy); Note, *U.C.C. § 2-615: Sharp Inflationary Increases in Cost as Excuse from Performance of Contract*, 50 NOTRE DAME LAW. 297, 306-08 (1974) (argues for price adjustments in borderline cases).

162. U.C.C. § 2-615 comment 6 (1978).

163. *Id.* § 2-208 comment 3.

164. See, e.g., *id.* § 2-609 comment 1.

165. See, e.g., *id.* § 2-612(2).

166. On increasing the security of contractual relationships, see *infra* subpart V(A). On keeping contracting parties together, see *infra* subpart V(B). See also Schmitt & Wollschlager, *supra* note 161, at 14 (concluding, after a similar analysis, that § 2-615 should be interpreted to permit flexible dispute resolution).

The Restatement (Second) of Contracts has adopted a provision analogous to the Uniform Commercial Code section 2-615 comment 6. The Restatement (Second) of Contracts section 272(2)¹⁶⁷ provides that when the traditional approach "will not avoid injustice" in discharge cases, the court may grant relief "on such terms as justice requires."¹⁶⁸ Comment c to section 272 elaborates upon this standard by stating that a court should supply a term that is "reasonable under the circumstances" to "salvage a part of the agreement that is still executory."¹⁶⁹ Comment c also cites to section 204 ("Supplying an Omitted Essential Term"). Section 204 advises a court to supply a term that comports with "community standards of fairness and policy" rather than analyze a "hypothetical model of the bargaining process."¹⁷⁰ The Restatement thus advocates a straightforward approach to modifying contracts rather than a formalistic legal approach and, like the Uniform Commercial Code, provides authority for a court to impose a modification.

A wealth of foreign precedent also favors court-imposed modifications. German courts, through the application of the doctrine of good faith (*True und Glauben*), impose modifications in discharge cases.¹⁷¹ In France, however, the courts are split: administrative courts recognize the viability of court-imposed modifications, but the civil courts adhere to the doctrine of *force-majeure*.¹⁷² Switzerland, through statutory provisions, permits its courts in discharge cases to either increase the contract price or rescind the agreement.¹⁷³ In addition, both Italy and Greece have codified the doctrine of court-imposed modifications.¹⁷⁴ Finally, the doctrine of changed circumstances (*Jijo Henko*) enables Japanese courts to equitably adjust contracts.¹⁷⁵ Considering the abundance of foreign precedent and the existing American authority, the lack of precedent argument should not preclude a court from imposing a modification.

D. Judicial Manageability

If the efficacy of court-imposed modifications is recognized, the question arises whether the courts will be capable of managing the mass of evidence necessary for fashioning an appropriate modification. For example, in *ALCOA* over 2000 pages of

167. For a brief discussion of § 272(2) and its possible ramifications, see Young, *Half Measures*, 81 COLUM. L. REV. 19, 31-34 (1981).

168. RESTATEMENT, *supra* note 4, § 272(2).

169. *Id.* § 272(2) comment c.

170. *Id.* § 204 comment d.

171. See *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 93 app. (W.D. Pa. 1980); Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1420 n.15 (1963); Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Law*, 18 DUQ. L. REV. 551, 553-54 (1980); Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 296-99 (1958).

172. See Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1421 n.16 (1963); Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Law*, 18 DUQ. L. REV. 551, 554-55 (1980); Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 301-03 (1958).

173. See *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 93 app. (W.D. Pa. 1980); Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 289-96 (1958).

174. See Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Law*, 18 DUQ. L. REV. 551, 555-56 (1980).

175. See *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 93 app. (W.D. Pa. 1980); Henderson, *Contract Problems in U.S.-Japanese Joint Ventures*, 39 WASH. L. REV. 479, 511-12 (1964).

testimony were amassed in a five-week trial.¹⁷⁶ Moreover, a significant part of the testimony from the twenty-two witnesses¹⁷⁷ was parol.¹⁷⁸ Even though the problems with creating such a sizable record ostensibly militate against the use of court-imposed modifications, these problems are far from insurmountable.

Although a problem with parol evidence may have been present in *ALCOA*, neither Essex nor ALCOA invoked the parol evidence rule.¹⁷⁹ This failure followed from the court's desire to impose a modification that effectuated the parties' original intentions. If this is a court's goal, then both parties will try to establish their original intentions in a way most favorable to their positions. Since the best way to establish intent is through parol testimony, the parties will both want and need to introduce parol testimony. Admittedly, the problems accompanying the compiling of a massive testimonial record cannot easily be explained away; they must be considered, however, in the context of the advantages to be gained by the imposition of a modification.

As previously discussed, several advantages can be gained through the use of court-imposed modifications. Imposition of a modification may benefit the public through decreased prices or increased competition.¹⁸⁰ A court-imposed modification may also help to stabilize the law in discharge cases because the court would not have to stretch existing doctrines to reach a supportable result under the traditional approach.¹⁸¹ Moreover, imposing a modification may increase the security of long-term contractual relationships by both decreasing the impetus to litigate and increasing the likelihood of an out-of-court modification.¹⁸²

The administrative problems associated with court-imposed modifications become less compelling when considered in light of the benefits to be derived from their use. In short, while compiling an extensive testimonial record may prove burdensome, it certainly can be managed.¹⁸³

V. THE CASE FOR COURT-IMPOSED MODIFICATIONS

The advantages of court-imposed modifications must be analyzed in relation to the current goals of contract law. The reasoning behind this form of analysis is twofold. First, such an analysis will show that court-imposed modifications are consonant with current contractual theory. Second, the analysis is appropriate because imposing modification is not a panacea that will eliminate all the problems associated with discharge cases; rather, it is another tool for a court to use in equitably resolving a contractual dispute.

176. Appellee's Brief to the United States Court of Appeals for the Third Circuit at 3, *ALCOA*.

177. *Id.* at 20-21.

178. *Id.* at 3.

179. *Id.* at 20-21.

180. See *supra* notes 129-31 and accompanying text.

181. See *supra* text accompanying notes 120-21.

182. See *id.*

183. See *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980).

A. Effectuating Commercial Relationships

Contract law today places continually greater emphasis on preserving contractual relationships. This current emphasis is partly attributable to the recognition that "planning is inherently filled with gaps."¹⁸⁴ Therefore, a number of doctrines have been developed to automatically fill some gaps and to assist the parties in filling others.

A principal development in this area is the implication of usage of trade,¹⁸⁵ prior course of dealing,¹⁸⁶ and course of performance¹⁸⁷ into contracts. Basically, the rationale behind these interpretative aids is that the parties' conduct under the agreement is the best indication of what the agreement means;¹⁸⁸ therefore, the parties' past conduct should be used to fill any gaps. These automatic gap fillers are supplemented by doctrines such as modification¹⁸⁹ and waiver¹⁹⁰ that make it easier for the parties themselves to fill gaps.

Both to make it easier for the parties to fill gaps and to maintain the flexible nature of contractual relationships,¹⁹¹ the requirement of consideration for a modification has been greatly relaxed.¹⁹² Coinciding with the relaxation of the requirements for a modification is the ability of a court to find waiver of a term whenever necessary to "preserve the flexible character of commercial contracts."¹⁹³ In this context, court-imposed modifications appear consistent with effectuating contractual relationships.

Essentially, a court-imposed modification is an attempt by the court to provide for the impact of a supervening event by modifying the contract. The court is not rewriting the contract; rather, it is filling a gap in the contract caused by a supervening event.¹⁹⁴ The imposition of a modification to meet the exigency of a supervening event is in accord with preserving the flexible character of commercial relations—it both maintains the vitality of the contractual relationship and encourages the parties to reach an out-of-court modification.¹⁹⁵

The imposition of a modification in a discharge case, in essence, is equivalent to the imposition of a term into a contract based on a prior course of performance. Both actions have the same purpose: to fill a gap consistent with the parties' intentions. Moreover, both actions usually have the same result: resolution of the problem and

184. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U.L. REV. 854, 873 (1978).

185. See RESTATEMENT, *supra* note 4, § 222; U.C.C. § 1-205 (1978).

186. See RESTATEMENT, *supra* note 4, § 223; U.C.C. § 1-205 (1978).

187. See U.C.C. § 2-208(1)-(2) (1978).

188. See *id.* § 2-208 comment 1.

189. RESTATEMENT, *supra* note 4, § 89(a); U.C.C. § 2-209 (1978).

190. See U.C.C. § 2-208 comment 3 (1978).

191. See U.C.C. § 2-209 comment 1 (1978) (declares its purpose to be the effectuation of "all necessary and desirable modifications").

192. RESTATEMENT, *supra* note 4, § 89(a) dispenses with the consideration requirement if the modification is fair and equitable. Similarly, U.C.C. § 2-209 comment 2 (1978) dispenses with the consideration requirement if the modification is for any legitimate commercial reason.

193. U.C.C. § 2-208 comment 3 (1978).

194. This is fundamentally the position taken by RESTATEMENT, *supra* note 4, § 272(2). Filling a gap created by a supervening event is equivalent to filling in an omitted essential term. See *supra* notes 167-70 and accompanying text.

195. See *supra* text accompanying notes 120-21.

maintenance of the contract's viability and flexibility. Thus, even though court-imposed modifications are based on the court's perception of the parties' original intentions, court-imposed modifications are similar to other gap-filling doctrines.

B. *Keeping Contracting Parties Together*

Contract law has become increasingly concerned with keeping contracting parties together until both sides have performed. This concern is evidenced by the obstacles that prevent a party from suspending performance upon a belief that the other party is in breach.

Initially a party who believes that his or her contracting partner has breached must consider whether the contract could be subject to divisible contract analysis.¹⁹⁶ In this regard, the party would also have to determine if the other party's partial performance could fall within the doctrine of substantial performance.¹⁹⁷ Even if these doctrines are inapplicable, for one party to be discharged from the duty to perform, the other party must commit a total breach, which requires that the conduct of the alleged breaching party "substantially" impair the value of the entire contract.¹⁹⁸ Furthermore, the ability of the other party to cure the defective performance must always be considered.¹⁹⁹ Finally, the extent to which the alleged breaching party's conduct comports with good faith and fair dealing is invariably an important factor.²⁰⁰

The emphasis on keeping contracting parties together can also be seen in the Restatement (Second) of Contracts' "more liberal" attitude toward specific performance.²⁰¹ In taking this more liberal attitude, the Restatement affirms the position taken by the Uniform Commercial Code on specific performance.²⁰² Further, the Restatement takes a new approach to the adequacy of damages: "Adequacy is to some extent relative, and the modern approach is to compare remedies to determine which is more effective in serving the ends of justice. Such a comparison will often lead to the granting of equitable relief. Doubts should be resolved in favor of . . . specific performance or injunction."²⁰³ Finally, in considering the difficulties that attend an order of specific performance, the Restatement advises that "[a]pparent difficulties of enforcement due to uncertainty may disappear in the light of courageous common sense."²⁰⁴

A principal reason for keeping contracting parties together is the inadequacy of damages.²⁰⁵ The inadequacy may be caused by various factors, but is likely to be

196. See RESTATEMENT, *supra* note 4, § 233(2); U.C.C. § 2-612(2) (1978).

197. See RESTATEMENT, *supra* note 4, §§ 243, 237 comment d; U.C.C. § 2-612(2) (1978).

198. See RESTATEMENT, *supra* note 4, § 243(4).

199. See RESTATEMENT, *supra* note 4, § 237 & comment b (party has an absolute right to cure); U.C.C. § 2-508(1) (1978) (right to cure, but not absolute in the sale of goods).

200. See RESTATEMENT, *supra* note 4, § 241(e).

201. RESTATEMENT, *supra* note 4, ch. 16 introductory note.

202. The "'inability to cover is strong evidence of' the propriety of granting specific performance." RESTATEMENT, *supra* note 4, § 360 comment c (quoting U.C.C. § 2-716 comment 2 (1978)).

203. RESTATEMENT, *supra* note 4, § 359 comment a.

204. *Id.* § 362 comment b.

205. See generally Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936); Fuller & Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937).

found when the parties contract over an extended period of time. The longer the contractual relationship, the greater the probability that one or both parties have taken actions in reliance upon it. The reliance placed upon the contractual relationship may manifest itself through ancillary contracts based upon the continued existence of the relationship.²⁰⁶ The reliance also may be displayed by a party's actions based solely upon the existence of the contractual relationship.²⁰⁷ In either situation, the need to keep the contracting parties together is increased.

The traditional approach, however, does not permit a court to take into consideration the reliance that may have occurred. The issue under the all-or-nothing approach often is simply whether a sufficient economic burden has been placed upon one party. The total impact that may accompany the termination of an agreement upon the contracting parties or third persons is irrelevant.

Conversely, court-imposed modifications are most appropriate when reliance has occurred. Indeed, the interrelationship between the contracting parties themselves and third parties may be the principal reason a modification is imposed. Court-imposed modifications, therefore, are more consistent with the policy of keeping contracting parties together than the all-or-nothing approach.

C. *The Loss Will Not Go Away*²⁰⁸

Many courts apparently believe that their decisions in discharge cases resolve the problem. This belief, however, is erroneous. The economic loss caused by the intervention of a supervening event does not simply go away after a court renders its decision. Rather, under the all-or-nothing approach, regardless of the outcome, one party is forced to internalize the loss caused by the supervening event.

The traditional approach furnishes a judge with two options in apportioning the loss. Through an order of specific performance, he or she can force one party to continue to perform at a loss.²⁰⁹ Alternatively, the court can discharge one party, and thus force the other party to find a substitute supplier, who often charges a higher price. Under the second alternative, the party attempting to secure a substitute supplier may be at a severe bargaining disadvantage because he or she may need the substitute goods to perform other contracts.²¹⁰ Court-imposed modifications, however, will provide a judge with a third, more equitable alternative.

Imposing a modification will permit a court to alleviate the loss in a discharge case. A court will be able to fashion a modification to equitably spread the loss between the parties. Moreover, even if the initial burden is placed upon one party, the

206. See, e.g., *supra* note 98 and accompanying text.

207. See, e.g., *supra* notes 99–100 and accompanying text.

208. This phrase, although not quoted exactly, comes from F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* 743 (2d ed. 1970).

209. See, e.g., *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied*, 444 U.S. 865 (1979) (court's order of specific performance forced Peabody to perform at a loss).

210. Consider, for example, the position of a house builder who has contracted to build a house and whose lumber supplier is subsequently discharged from an ancillary agreement because of a lumber shortage. The house builder, notwithstanding the discharge of the lumber supplier, will still be bound to build the house within the time and at the price provided by contract. Therefore, the house builder will have no alternative—other than breach—but to go into the lumber market and pay an inflated price for the lumber.

court can adjust for this burden over the term of the contract in its fashioning of the modification. Thus, court-imposed modifications will permit a slow, deliberate loss-apportionment, rather than the abrupt, all-or-nothing result caused by applying the traditional approach to discharge cases. Although some courts may scoff at loss-splitting in this manner, they would do well to bear in mind that "the loss having occurred, neither a rule of strict liability nor a rule of easy discharge will make the loss go away."²¹¹

D. *Implying a Modification*

After recognizing the efficacy of court-imposed modifications, the judge must determine when they should be imposed. Because of a lack of case law guidelines, judges may be apprehensive about imposing modifications. Nevertheless, by applying existing case law and logic some broad guidelines can be developed.

A basic, oversimplified test can be stated as follows: when "neither sense nor justice"²¹² will be served by adherence to the traditional approach, a court-imposed modification is appropriate. In determining when sense and justice require a modification, a variety of factors can be considered. First, the use of court-imposed modifications should generally be limited to long-term contracts; the reasons for implying a modification—to keep the contracting parties together and to protect the parties' expectations—are not present in discrete transactions.²¹³ Second, the court should determine the extent to which imposing an all-or-nothing solution will cause undeserved losses to be imposed on a party. In making this determination, the court should consider the parties' expectations; simply comparing the market price with the contract price may under-evaluate the party's actual position.²¹⁴ Third, actions taken in reliance upon the continuing vitality of the contract should be considered. Included in this category are actions premised solely upon the existence of the contract²¹⁵ and the entrance into ancillary agreements premised upon the continuing vitality of the contract.²¹⁶ A critical consideration in this context would be the reasonableness of the reliance;²¹⁷ a court, of course, should not protect unreasonable or capricious actions taken by a party. Fourth, the effect of the termination on third parties or the public should be considered. The public interest may be an especially germane consideration when the termination will result in loss of jobs²¹⁸ or decrease in competition.²¹⁹ Last, the court should give weight to the extent to which the parties' conduct has been consistent with the current standards of good faith and fair dealing.²²⁰ This considera-

211. F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* 743 (2d ed. 1970).

212. U.C.C. § 2-615 comment 6 (1978).

213. See Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U.L. REV. 854, 856-64 (1978).

214. See *supra* text accompanying note 105.

215. See *supra* text accompanying notes 99-100.

216. See *supra* text accompanying note 98.

217. See RESTATEMENT, *supra* note 4, § 90 comment b.

218. In *ALCOA*, for example, if Essex had been forced to close its processing plant, it is likely that a number of people would have been put out of work. See *supra* note 108 and accompanying text.

219. In *ALCOA*, for example, if Essex had to withdraw from the several aluminum businesses in which it had been able to compete because of the Molten Metal Agreement, competition obviously would have decreased. See *supra* note 111 and accompanying text.

220. See *supra* notes 64-65.

tion may also be important in structuring the modification, for, of course, the court will want to reward conduct exemplifying a high standard of fair dealing.

The above mentioned considerations provide merely a rough guideline. This Comment is unable to set out every possible consideration and the weight to be accorded to it. This task can only be accomplished by a court after analyzing the facts of the particular case. Clearly, guidelines can be established only after courts have created jurisprudence on point. But the current lack of criteria cannot justify a court's refusal to impose a modification. If all courts refuse to impose modifications because of the lack of guidance, the necessary case law to establish guidelines will never exist. Therefore, judges must take the initiative if guidelines are to be established.

VI. CONCLUSION

One commentator has characterized Judge Teitelbaum's opinion in *ALCOA* as going "too far too fast."²²¹ This Comment, however, has shown that court-imposed modifications are not a new and radical innovation, but are consistent with the goals and objectives of contract law. Court-imposed modifications are consonant with gap-filling in contracts and provide a flexible process for dispute resolution. Furthermore, because the arguments against court-imposed modifications are unpersuasive, no real barrier to a court's taking the initiative and imposing a modification exists.

In 1924 Justice Cardozo, in a lecture to a group of law students, speculated that "[p]erhaps, with a higher conception of business and its needs, the time will come when even revision will be permitted if it is revision in consonance with established standards of fair dealing, but the time is not yet."²²² Perhaps in 1983, with the intervening changes in contract law, Justice Cardozo would state that the time has come.

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221. Professor Speidel reached this conclusion in his article, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 Nw. U.L. Rev. 369, 421 n.204 (1981). Professor Speidel contends that court-imposed modifications should be imposed only when a party has exhibited bad faith in post-bargaining negotiations. *Id.* at 404-22. The author of this Comment believes that this test is unmanageable and would be applicable so infrequently that it would defeat the purpose of court-imposed modifications.

First, the post-bargaining analysis will be frustrated by the positions of the parties and by the verbal nature of the bulk of negotiations. By the time the parties decide to litigate, their positions have become polarized. See Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, PRAC. LAW., Nov. 1963, at 13, 17-18. Hence, the court will be attempting to get information concerning, to a significant extent, verbal negotiations from parties who probably will have very different views of the negotiations. Because negotiations usually are not transcribed or recorded, a judge may have considerable difficulty in determining the exact offers and counter offers that were made by the parties. This information, however, would be crucial in determining if one party had acted in bad faith.

Second, the principal problem is with proving bad faith in a post-bargaining situation. Beginning from the principle that it is not bad faith for an advantaged party to refuse to modify a contract, *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 725 (Mo. Ct. App.), *cert. denied*, 444 U.S. 865 (1979), it is difficult to conceive of a situation in which a party's actions in the post-bargaining situation would constitute bad faith. Apparently, in only the most flagrant cases could bad faith be proved. Thus, Professor Speidel's approach would limit the imposition of modifications to a few exceptional cases.

Last, Professor Speidel's approach focuses on the behavior of the parties—not the need for a modification. If a modification is appropriate under the circumstances, the behavior of one of the parties, although certainly a factor to be considered in formulating the modification, should not be controlling. This would be especially true when the interests of third parties or the general public are implicated.

222. B. CARDOZO, *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 236 (M. Hall ed. 1947) (footnote omitted).